

## *Getting it Right!*

### **30 recommendations for improving the lives of people claiming asylum on the basis of sexual orientation or gender identity (SOGI) in the UK**

It is now nearly forty years since the first SOGI asylum claims were recognised, and a great deal of progress has been made at a global and European level. There is increased awareness of SOGI persecution as well as examples of good policy and practice that should be publicised and replicated. However, alongside these, the SOGICA project found many areas where improvement is urgently needed, and we address these here. These recommendations largely reflect the views of almost 500 people, those who participated in the SOGICA project's interviews, focus groups and online surveys.

These recommendations are written in the midst of the COVID-19 pandemic, which, among other things, has shown that at times of crisis inequalities between individuals and groups in society widen. This underlines the need for domestic legislation and policy to be based on international refugee and human rights standards, and not dependent on the good will of the government of the day. This will help ensure that in future global crises we really will be 'all in in together'.

#### **Recommendations: asylum law and policy**

##### **1. Safe passage to Europe**

There is little point in improving asylum law and policy if individuals at risk are unable to reach Europe to claim protection. Even when passage to Europe for SOGI minorities fleeing persecution is possible, it is almost always extremely risky and costly. Building on the 2018 motion by the European Parliament, **the government** should introduce humanitarian admission programmes and visas to help people in flight reach Europe safely.

##### **2. A statistical evidence base**

Any transparent and accountable asylum system needs to maintain and publish rigorous and up-to-date statistics on different types of asylum claims and their outcomes. Yet, within Europe, there are still no clear and comprehensive statistics for SOGI claims. **Asylum and judicial authorities** should record the number of SOGI claims submitted, and the grounds used to refuse or accept of NGO service

##### **3. Implementing the right to information**

Claimants are often unaware at the time of their arrival that SOGI can be a basis for claiming asylum. This contributes to 'late' and poorly prepared legal claims. We recommend that **national authorities** provide information about asylum and the right to make a SOGI-based claim, including in easy-read formats and different languages, at a minimum at ports of entry and at asylum interview, reception and accommodation centres. At the start of the screening or initial interview, the **interviewer** should confirm that the claimant is aware of the different reasons for claiming asylum, including SOGI persecution. However, none of these measures should mean that failure to declare SOGI as the basis for claiming asylum is subsequently held against claimants.

#### 4. Doing justice to 'late' claims

SOGI asylum claimants are likely to make their asylum claim sometime after arriving to the host country for a number of reasons, including their lack of awareness that SOGI is a legitimate basis for claiming asylum and their likely fear of disclosure to officials or to other people they come in contact with. Yet, 'late disclosure' continues to be a factor that is held against claimants and used to discredit their claims. **Asylum authorities** should not discriminate against 'late' claims, as confirmed by European jurisprudence.

#### 5. Limiting the duration of asylum procedures

The length of time that many claimants must wait for an initial decision and then for their appeal – sometimes totalling years – is a cause of much distress, as during this period people are generally unable to study, work, secure family reunion or move forward in any way with their lives. **Asylum and judicial authorities** need to invest in building their capacity to shorten the time and publish targets for both initial decisions to be made and for appeals to take place, although not at the expense of a thorough consideration of claimants' cases.

#### 6. Abolishing detention of SOGI claimants

Detention is an injustice to any individual who has not been charged with or found guilty of a crime, and that includes all asylum claimants. SOGI asylum claimants in detention not only experience difficulties in accessing the information and advice they need to make their claim, but often also experience discrimination and re-traumatisation related to their SOGI. **The government** should end the detention of SOGI asylum claimants, including the inhuman practice of detention without a time limit.

#### 7. Statutory guidance on SOGI asylum

All **asylum authorities** should produce and make public guidance for decision-makers on SOGI claims and ensure they are applied consistently and regularly reviewed. SOGI asylum claimants and refugees should be recognised as the main source of expertise in this field of policy and law, and should be involved in preparing and delivering guidance and training materials.

#### 8. Mandatory training

Even where good policies and guidance exist, there is a worrying degree of inconsistency in decision-making, with claimants from the same country and sometimes with very similar experiences receiving inconsistent decisions, and officials failing to apply existing law and policy correctly. **The government** should ensure provision of better training for all parties, including decision-makers, judges, interpreters, and service-providers, to improve their confidence in the quality of their work as well as to benefit SOGI asylum claimants. Training should be mandatory on induction and repeated at regular intervals.

#### 9. Judicial guidance and training

All **judicial bodies** should develop a code of conduct that includes equality and diversity, similar to the UK Equal Treatment Bench Book. Codes alone, though, are not enough and there should also be measures in place, such as mandatory induction and ongoing training, to ensure that all judges are familiar with and apply such codes.

#### 10. Promoting a culture of empathy

The specificities of guidance and training materials depend on the institutional context, however there are some elements that should be included in all materials, including: the importance of empathy, awareness of equality and human rights, appropriate terminology, confidentiality assurances, how to create a safe space, training on the effects of trauma on individuals and unconscious bias.

## 11. Improving legal advice and representation

SOGI asylum claims are often particularly complex and require legal representatives who have experience and expertise in this area. Yet, many claimants have difficulty accessing good legal advice, and people in detention centres, reception centres or remote accommodation are particularly likely to have difficulties. Part of the problem is a general lack of sufficient funding for legal aid, and **the government** needs to invest in this area not only as an ethical requirement, but in the interest of efficiency.

## 12. Offering adequate interpretation services

Interpreters have an important role in interviews and at appeal hearings, and it is critical that SOGI claimants are able to feel confident about interpreting services in both these settings. An interpreter who is homophobic or transphobic, or perceived by the claimant to be such, can seriously damage communication. SOGI claimants may be wary of interpreters from their own ethnic communities as they may fear they share the homophobia or transphobia they have fled or will put them at risk by disclosure. **Asylum authorities** should allow claimants to provide their own interpreter at the expense of the state, and to request a replacement where they have concerns about the interpreter provided. Claimants should be informed that they have the right to request a male or female interpreter and the exercise of this right should be facilitated.

## 13. Procedural needs

There are a number of practical improvements that **asylum and judicial authorities** should make both in relation to interview and appeal hearings. Officials should always introduce themselves, check the claimants' name and confirm how they would like to be addressed. Claimants should be informed that they have the right to request a male or female interviewer and the exercise of this right should be facilitated. Confidentiality protocols should be in place, including for interpreters, and the claimant should be informed of these. Interviewers and judges should avoid questions that seek a linear evolution or moment of discovery such as 'when did you realise you were gay (or lesbian/bisexual/transgender/etc.)' in favour of open-ended questions that allow the claimant to tell their story in their own time and terms. We recommend that claimants be allowed to take a supporter or friend, as well as their legal representative, to their interview to provide moral support. To improve accountability and claimants' trust in proceedings, there should be accessible complaints procedures as there are in most areas of public service.

## 14. No such thing as 'safe countries'

Some European countries have long designated some countries as 'safe', meaning that claims from these countries will be assumed to be unfounded or less likely to be successful. This is not only in conflict with the need to carry out an individual assessment of each asylum claim, but is particularly problematic for SOGI claims, as SOGI rights and protection may be denied in countries with otherwise acceptable standards. **Asylum authorities** should no longer designate some countries as 'safe'.

## 15. Accelerated procedures

'Safe country' lists are often accompanied by 'fast-track' procedures, which are detrimental to SOGI claimants, whose cases are recognised as being complex and time-consuming to prepare. Rather than making use of accelerated decision-making procedures for claimants of certain nationalities, **asylum authorities** should favour the same thorough consideration to all claims.

## 16. Improving the quality of Country of Origin Information (COI)

Accurate and extensive COI is critical to good asylum decision-making, yet data on SOGI asylum is scarce and often outdated, leading to flawed decisions. **Asylum and judicial authorities** should make better use of existing resources, such as the European Asylum Support Office (EASO) COI portal in decision-making and further develop their COI resources. General and SOGI asylum NGOs should be invited to contribute their expertise and knowledge (and appropriately paid for their input).

## 17. Making use of all the Refugee Convention grounds

In order to recognise the many factors and identities that are the basis for SOGI persecution, **decision-makers** should make better use of all the Refugee Convention grounds when assessing SOGI asylum claims, rather than invariably relying on the 'particular social group' (PSG) category. Where the PSG category is used, **asylum and judicial authorities** should follow UNHCR guidance and only require that claimants either share an innate or fundamental characteristic or common background, or are perceived as having a distinct identity as a group – not both.

## 18. Persecution over membership of a PSG

To accurately reflect international refugee law and European jurisprudence, **asylum authorities** should stress that the question for **decision-makers** to ask is not whether claimants are 'truly' LGBTIQ+ (lesbian, gay, bisexual, trans, intersex, queer and others), but only whether they are likely to be persecuted on SOGI grounds if they were to be returned to the country of origin.

## 19. Criminalisation of same-sex sexual acts as persecution

Against UNHCR guidance, some asylum authorities do not recognise legislation criminalising same-sex sexual acts as persecution unless that legislation is enforced and entails significant penalties. This ignores the broader societal discrimination that accompanies legislation and the fact that unenforced legislation may be enforced at any time. **Asylum and judicial authorities** should recognise criminalisation of same-sex sexual acts, regardless of enforcement, as sufficient to make a finding of persecution. Following this, **asylum and judicial authorities** should also recognise that, as criminalisation usually applies to a country's entire territory, there can rarely be internal flight or relocation alternatives for SOGI claimants from those countries.

## 20. Abolishing 'discretion reasoning'

The UK now recognises that it is unacceptable to require SOGI claimants to return to their country of origin and live 'discreetly' by concealing their sexual orientation or gender identity. However, 'discretion reasoning' persists in the assumption that it is reasonable to return to their countries of origin claimants who would 'choose' to hide their sexual orientation or gender identity for reasons other than persecution, such as social customs. This is a dangerous policy in assuming that decision-makers can establish the future behaviour of an individual and ignoring the fact that choosing whether or not to disclose their SOGI is rarely completely within the individual's control. **Asylum and judicial authorities** should thus remove all traces of 'discretion' thinking from decision-making.

## 21. Standard and burden of proof

Asylum claimants are often required to meet unfairly high evidentiary standards. In practice, asylum and judicial authorities apply a standard of proof that goes beyond the 'reasonable degree' threshold claimants are required to meet under international refugee law, often simultaneously violating the principle of the benefit of the doubt. Asylum authorities also often fail to adopt a sufficiently active role in evidence-gathering. Instead, **asylum authorities** should respect the correct standard of proof, including the principle of the benefit of the doubt, and share the burden of proof with asylum claimants.

## 22. Use of humane means of evidence

Although it is now accepted that evidence of an explicit sexual nature should not be elicited or accepted, interrogating claimants about their relationships and behaviour regularly goes beyond what should be permissible. The excessive scrutiny of claimants' sexual history and experiences of persecution that often takes place in interviews and hearings fails to respect their personhood and would not be acceptable in other settings. **Asylum and judicial authorities** should apply the same standards of civility and dignity to SOGI (and all) asylum claimants as to any other member of society when gathering evidence.

## 23. Stereotyping

Decision-makers often fail to understand the individual claimant, because of assumptions and prejudices. These include, among others, expectations that claimants have a partner or are sexually active, take part in LGBTIQ+ activism, provide a 'coming out' narrative, and have difficulty reconciling their SOGI with their religious beliefs. Conforming to such stereotypes undermines the individual premise of refugee decision-making. **Asylum and judicial authorities** should not make use of 'stereotyped notions' neither during the interviews, nor in their decisions.

## 24. Credibility

Credibility is a key element in many, if not most, SOGI asylum decisions, by which we mean overall belief in the claimant's testimony. Decision-making is too often based on an attempt to objectively 'prove' a claimant's SOGI and starts from a position of scepticism that the claim is 'genuine'. Time and again during our fieldwork, claimants asked us, despairingly or wearily: 'So how can I prove my SOGI?' We recommend that **asylum and judicial authorities** take the evidence, particularly the personal testimony, submitted by claimants as the starting point for credibility assessment. The default position should be belief in claimants' account of who they are and what has happened to them.

## 25. Facilitating family reunification

If international protection is granted, a first priority for some individuals is to be reunited with their children and partners. **Asylum and judicial authorities** should ensure that definitions of family include same-sex unions for the purpose of family reunification, and the evaluation of SOGI claimants' requests should take into account both their difficulty in having their relationships recognised in their countries of origin or transit, as well the connected struggle to provide evidence of such unions.

# Recommendations: beyond the asylum adjudication process

## 26. Promoting social integration

We recommend that **the government** develop holistic policies for refugee integration that recognise the specific needs of SOGI claimants. The priority for such policies is to ensure that every claimant and refugee feels safe and welcomed from the time of arrival, and is quickly recognised as a respected member of the host society. This is essential in light of the wide-spread hostility to refugees (and migrants more generally) in Europe, juxtaposed with persistent and often increasing homophobia and transphobia.

## 27. Safe and adequate accommodation

Many SOGI asylum claimants are housed in general accommodation or reception centres where their needs are unrecognised or – worse – they experience discrimination. **Asylum authorities** need to pay particular attention to the safety of SOGI claimants in asylum accommodation, where residents are vulnerable to homophobic, transphobic, racist and anti-migrant violence and hate crime. **Asylum authorities** should give SOGI claimants the choice to be accommodated with other SOGI claimants in separate facilities if that is their wish. There are particular concerns for trans claimants, making trans-specific accommodation upon request a priority. Such accommodation is often better provided by NGOs than contracted out to large companies. Individuals should have as much choice as possible about the area where they live and the type of housing in which they live, and have access to appropriate information, support groups and social activities.

## 28. Fostering physical and mental health

SOGI asylum claimants have particular health needs that are often overlooked: like many asylum claimants, they are likely to have mental health problems and often suffer from depression. Hormonal or gender-affirming therapy for trans claimants and refugees, including continuity of medical care, is also an area of need. **Health authorities** should increase service provision in both these areas and ensure SOGI asylum claimants and refugees are aware of their healthcare

entitlements. More broadly, access to healthcare should be universal, not restricted to emergency provision, and include staff and interpretation services trained on asylum and SOGI matters.

## 29. Facilitating equal access to the labour market and education system

SOGI claimants are often discriminated against at work on grounds of both SOGI and ethnic background or refugee status; they may also need to rely on community support to find work – all factors which may make it hard for them to be open about their identities, and make it necessary for **the government, employers and trade unions** to take measures to tackle these particular experiences of workplace discrimination. The denial of the right to work to many asylum claimants, in combination with a long asylum process, may not have a particular SOGI dimension but was raised by nearly all of our participants as a cause of stress and hardship. This means that **the government** should include in social integration policies measures to improve access to the labour market, further and higher education, and training.

## 30. Nurturing civil society initiatives and NGOs

Asylum claimants often trust NGOs and depend on them for support, far more than they depend on other service providers. There are excellent SOGI refugee organisations that offer invaluable help. However, NGOs often support either refugees or SOGI minorities, but not both. This means SOGI asylum claimants and refugees are not always able to obtain holistic services that are responsive to all their needs. There must be adequate funding for SOGI-specific refugee NGOs to expand their reach. There is also potential for NGOs working in different fields to explore partnership options and develop joint or shared services, but always drawing on the expertise of the SOGI-specific refugee organisations and SOGI refugees themselves. Community organisations set up by SOGI claimants themselves are a huge source of support and expertise but often face a particular struggle to obtain funding. **Funders** should make their funding more accessible to new community organisations with expertise on SOGI asylum. Funders should also support collaboration between NGOs working in different areas.

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In making these recommendations we are aware that there is a bigger picture; that many of the problems that affect SOGI minorities claiming asylum are shared with other claimants, refugees and migrants more generally – issues such as racism, a culture of disbelief, reductions in legal advice and representation, and arbitrary and inconsistent decision-making. While these issues are beyond the scope of this project, we believe these recommendations are a basis for making some focussed and often small changes that would nonetheless make a real difference to the lives of SOGI and other asylum claimants and refugees within the larger context of the struggles for the rights of all refugees and SOGI minorities.

## *The SOGICA project*

*SOGICA is a four-year (2016-2020) European Research Council-funded project based in the University of Sussex that researches the legal and social experiences of SOGI asylum claimants in Europe, with a particular focus on Germany, Italy and the UK. The project's methodology consisted of 143 interviews with SOGI asylum claimants and refugees, NGOs, policy-makers, decision-makers, members of the judiciary, legal representatives, and other professionals; 16 focus groups with SOGI asylum claimants and refugees; 24 non-participant contextual observations of court hearings; documentary analysis and freedom of information requests. Full details of the project and all our activities and resources are available on the project website [www.sogica.org](http://www.sogica.org). The full socio-legal analysis of our findings is presented in the book *Queering Asylum in Europe* (Springer 2020).*



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